

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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SEP 27 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Amendment of Part 90 of the Rules )  
to Provide for the Use of the )  
220-222 MHz Band by the Private )  
Land Mobile Radio Service )  
)  
Implementation of Sections 3(n) )  
and 332 of the Communications Act )  
)  
Regulatory Treatment of Mobile )  
Services )  
)  
Implementation of Section 309(j) )  
of the Communications Act -- )  
Competitive Bidding, 220-222 MHz )

PR Docket No. 89-556  
RM-8506

GN Docket No. 93-252

PP Docket No. 93-253

TO: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF PAGING NETWORK, INC.

Respectfully submitted,

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## Summary

It is incumbent upon the Commission to create a regulatory framework that will allow 220 MHz licensees to effectively compete in the already highly competitive CMRS marketplace. The elements required for 220 MHz licensees to effectively compete in the CMRS marketplace have been proposed in the *Third NPRM* and PageNet supports the Commission's effort in creating a flexible regulatory framework that will: (1) allow for the more efficient licensing of the 220 MHz band; (2) eliminate unnecessary regulatory burdens on both existing and future licensees; and (3) enhance the competitive potential of the 220 MHz service in the mobile services marketplace.

PageNet supports the proposed geographic licensing framework because it will allow customers to obtain local to nationwide service from a variety of competing 220 MHz licensees. In addition, the licensing of 220 MHz licenses on an EA, regional and nationwide service area will have many benefits for both licensees and subscribers, including competition, varied services, rapid implementation and lower costs to consumers.

PageNet supports the use of competitive bidding for the Phase II licensing of the 220 MHz band. In this instance, the Budget Act clearly authorizes the Commission to assign the spectrum through competitive bidding. There is no doubt that the use of the spectrum, once awarded, will likely involve commercial, for-profit activities. Competitive bidding allows the government, on behalf of the American people, to collect some measure of value for the use of the public spectrum. Competitive bidding also discourages speculation of public spectrum and, because speculation is diminished, competitive bidding encourages more rapid roll-out of service.

In the *Third NPRM*, the Commission tentatively concluded that there should be no set-aside for noncommercial channels in the Phase II licensing and that the remaining nationwide channels should be made available to all applicants. PageNet supports these conclusions and believes that noncommercial set-asides and eligibility limitations will not benefit the development and efficient use of the 220 MHz band.

PageNet supports the Commission's proposals regarding the channel block sizes of the Phase II licenses. As proposed, the channel block allocations should allow 220 MHz band licensees to compete in the CMRS marketplace by offering a variety of PCS-type, one-way, two-way, data and other services. In addition, the proposed channel block allocations also provide for the possibility of numerous licensees in any given area, which will promote competition and a greater variety of services.

The competition in the CMRS marketplace will include cellular carriers, 800 and 900 MHz SMR carriers, paging carriers, broadband and narrowband PCS carriers - all providing a variety of traditional and advanced services. Therefore, the Commission must provide the 220 MHz service with the regulatory framework to compete within the CMRS marketplace, including the ability to aggregate spectrum in order to offer services that require a greater than 5 kHz bandwidth. In addition, PageNet believes that when the Commission awards CMRS licenses pursuant to competitive bidding, the licensees should be given the greatest latitude possible for the introduction of new and advanced services as well as traditional services, such as paging.

PageNet believes that there is no question that the Commission should allow the competitive bidding process to be the incentive for spectrum efficiency. If the Commission were to require the licensees that aggregate spectrum to demonstrate that their services are at least spectrally efficient as narrowband channelization, the Commission will be foreclosing the number of service offerings that could be provided on the 220 MHz band spectrum. In addition, narrowband channelization, due to lack of equipment has significantly delayed the implementation of services in the past.

Revision of the rules applicable to 220 MHz service compels the return of the presently pending noncommercial nationwide applications which have, by virtue of the new rules, become inconsistent with the new regulatory framework of 220 MHz. Specifically, the 220 MHz services, particularly noncommercial services, will be operating under dramatically different regulations. Therefore, the Commission should dismiss and return the applications, together with the applicable application fees, without prejudice. The applicants who desire to reapply and participate in the spectrum auction would be free to do so.

The 220 MHz band should be and will be a valued element in the CMRS marketplace and an important element of the information super highway. To provide the 220 MHz service with the ability to compete in the CMRS marketplace, the Commission should adopt measures that provide for flexibility in the build-out and operation of the 220 MHz systems. Those measures were proposed in the *Third NPRM* and include different license service areas, channel aggregation and the ability to offer one-way, two-way, data or any other type of service.

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In the Matter of	)	
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Amendment of Part 90 of the Rules	)	
to Provide for the Use of the	)	PR Docket No. 89-552
220-222 MHz Band by the Private	)	RM-8506
Land Mobile Radio Service	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile	)	
Services	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act --	)	PP Docket No. 93-253
Competitive Bidding, 220-222 MHz	)	

TO: The Commission

**COMMENTS OF PAGING NETWORK, INC.**

Paging Network, Inc. ("PageNet"), by its attorneys, hereby submits its comments in response to the Commission's Third NPRM in this proceeding.<sup>1</sup> In support of these Comments, the following is respectfully shown:

**I. Statement Of Interest**

PageNet is the largest paging company in the United States. PageNet provides paging service to over five million subscribers

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<sup>1</sup> In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of 220-222 MHz Band by the Private Land Mobile Radio Service; Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552, RM-8506, GN Docket No. 93-252, PP Docket No. 93-253, FCC 95-312 (1995) ("Third NPRM").

and continues to expand its existing paging systems while establishing new paging systems in new markets. PageNet is the licensee of hundreds of Private Carrier Paging ("PCP") systems and public land mobile paging systems. In addition, PageNet is authorized to provide nationwide narrowband PCS services and is currently constructing its nationwide narrowband PCS systems. As a major player in the mobile radio services industry, PageNet has a substantial interest in, and is uniquely qualified to comment on, the issues set forth in the instant proceeding.

**II. The Commission Should Adopt A New Regulatory Framework For The 220-222 MHz Band**

Having determined to regulate the 220-222 MHz services as a Commercial Mobile Radio Service ("CMRS") it is incumbent upon the Commission to create a regulatory environment that will allow 220 MHz licensees to effectively compete in the already highly competitive CMRS marketplace. The elements required for 220 MHz licensees to effectively compete in the CMRS marketplace have been proposed in the *Third NPRM* and PageNet supports the Commission's effort in creating a flexible regulatory framework that will: (1) allow for the more efficient licensing of the 220 MHz band; (2) eliminate unnecessary regulatory burdens on both existing and future licensees; and (3) enhance the competitive potential of the 220 MHz service in the mobile services marketplace. Below PageNet provides its specific comments regarding the Commission's proposals.

**A. The Commission Should License The 220 MHz Band On A Nationwide, Regional and Economic Area Basis**

In the *Third NPRM*, the Commission proposed to license 220 MHz on a nationwide, regional and economic area ("EA") basis. PageNet supports the proposed geographic licensing framework because it will allow customers to obtain local to nationwide service from a variety of competing 220 MHz licensees. Specifically, the people in the United States are increasingly mobile for both business and personal reasons. Being mobile in the United States means the ability to access or transmit information no matter what the location. As such, because consumers require local to nationwide service, licensing the Phase II 220 MHz authorizations on an EA, regional and nationwide basis is imperative to the needs of wireless customers and to the success of the 220 MHz services in the CMRS marketplace.

In addition, the licensing of 220 MHz licenses on an EA, regional and nationwide basis will have many benefits for both licensees and subscribers. For licensees, the differing authorization sizes will allow participation by small, medium and large carriers in which local to nationwide service will be provided by a number of different licensees in each marketplace. In addition, if given flexibility in the types of services that are able to be provided, licensees will be able to create and offer niche services as dictated by the marketplace. For customers, the benefits will be the ability to acquire services from a variety of carriers on a local to nationwide basis. Increased competition will mean a greater variety of services, new

services developed and implemented more rapidly, and lower costs to consumers. Accordingly, the Commission should license 220 MHz on an EA, regional and nationwide basis.

Finally, in the *Third NPRM*, the Commission asked whether it should retain a nationwide allocation for the 220 MHz band. PageNet strongly urges the Commission to license the current 220 MHz nationwide allocation on a nationwide basis because there is clearly consumer demand for nationwide services. In addition, potential competitive services, such as PCS, PCP, and even public land mobile paging, all have allocations for nationwide operations. From a competitive standpoint, the Commission must retain a nationwide allocation for 220 MHz services.

## **B. Phase II Licensing Of The 220 MHz Service**

### **1. Channel Assignment Method**

In the *Third NPRM*, the Commission tentatively concluded that the principal use of the 220 MHz spectrum, including the 30 channels currently allocated for noncommercial nationwide use, will most likely be for the transmission or reception of communication signals to subscribers for compensation. Therefore, the Commission determined that Phase II 220 MHz licenses that are mutually-exclusive with other applications for initial licensing should be awarded through the use of competitive bidding pursuant to Section 309(j)(2)(A) of the Act. PageNet supports this determination because there is no longer any real doubt that sound public policy requires auctioning of CMRS spectrum. Competitive bidding allows the government, on behalf of the American people, to collect some measure of value for the use of the public



spectrum. Competitive bidding also discourages speculation of public spectrum and, because speculation is diminished, competitive bidding encourages more rapid roll-out of service. By defeating speculators prior to their acquisition of the spectrum, the value placed on the spectrum by carriers goes to the U.S. Treasury and not in the pockets of the speculators. Finally, because carriers have to pay for the spectrum, they will have greater incentive to offer a variety of services to consumers as quickly as possible.

Lotteries, meanwhile, do nothing to ensure that the licensee is the person or business most likely to use the spectrum for the public good. They do nothing to ensure that the licensee will actually use the spectrum to provide any service, much less do so quickly. Indeed, in prior years, many licenses granted by lottery were eventually forfeited for failure to construct stations or sold prior to the construction of the systems. Under a lottery system, it is only by happenstance that the spectrum lands in the hands of those who will use it most productively.

Comparative hearings are not any better. Hearings consume a tremendous amount of time, money, and other resources. In many cases, those who ultimately prevail are not necessarily the best qualified applicants.

With respect to the nationwide channels, lotteries will result in significant windfalls to the successful applicants, who will receive licenses that are far more valuable than the ones for which they applied. For instance, if the Commission ultimately adopts its proposal to award licenses regardless of how the

applicants intend to use them, pending applicants for nationwide noncommercial licenses who had no expectation of realizing any profit from the licenses, will suddenly be in a position to provide commercial services. If the licensees ultimately decide to use their spectrum for commercial purposes in competition with other commercial radio services, the licensees will be at a distinct competitive advantage, having acquired the licenses without any significant investment to recoup.<sup>2</sup>

Section 309(j)(2) of the Communications Act, as amended by Section 6002 of the Budget Act, states, in relevant part:

(2) USES TO WHICH BIDDING MAY APPLY.--A use of the electromagnetic spectrum [for which the Commission shall have the authority to grant a license or permit to a qualified applicant through the use of competitive bidding] is described in this paragraph if the Commission determines that--

(A) the principal use of such spectrum will involve or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee--

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate or . . . .<sup>3</sup>

The Budget Act clearly authorizes the Commission in this instance to assign the spectrum through competitive bidding.

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<sup>2</sup> See, e.g., *National Wireless Network Corp.*, 9 FCC Rcd 3635 (1994) (a narrowband pioneer's preference license recipient who receives a license for free will enter the marketplace with a substantial competitive advantage over licensees who pay for their licenses).

<sup>3</sup> Section 309(j) of the Communications Act; Omnibus Budget Reconciliation Act, 107 Stat. 388 (emphasis added).

There is no doubt that the use of the spectrum, once awarded, will likely involve commercial, for-profit activities. Because the 220 MHz service will allow licensees to engage in commercial mobile services, the likelihood of the licensee not taking advantage of this capability is nil. Indeed, if the ultimate licensee is not interested in offering commercial services itself, it could potentially sell the spectrum once the rules allow such a sale, for eventual for-profit use.

Finally, any decision to distribute the spectrum other than by competitive bidding would contravene the underlying goals of the Communications Act. Under Section 309(j)(3)(A) of the Communications Act, the Commission is charged with promoting the "development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." Lottery winners generally have no real incentive to construct facilities and expedite the delivery of services to the public. Similarly, the introduction of services will likely be delayed by time-consuming and dilatory comparative hearings. Lotteries and comparative hearings are inconsistent with the Commission's obligation to promote "efficient and intensive use of the electromagnetic spectrum" under section 309(j)(3)(D). An auction winner would have an economic incentive to design and build its system to offer low-cost service to the public by, among other things, using spectrum-efficient technology that minimizes the need for future upgrades of its facilities to accommodate spectrum shortages. By contrast, a lottery winner, if it actually

did build out its system, would be more likely to construct a system using relatively inexpensive, spectrum-inefficient technology, to allow for the sale of its license as soon as the Commission rules permit.

Accordingly, for the reasons stated above, there is no question that the Commission should utilize competitive bidding for all future 220 MHz licensing.

## **2. Eligibility**

In the *Third NPRM*, the Commission tentatively concluded that there should be no set-aside for noncommercial channels in the Phase II licensing and that the remaining nationwide channels should be made available to all applicants. PageNet supports these conclusions and believes that noncommercial set-asides and eligibility limitations will not benefit the development and efficient use of the 220 MHz band. In fact, because technology allows for the ever more efficient use of spectrum, it is hard to envision any business entity with the internal communications needs that require the total spectrum allotted for each 220 MHz authorization. Although some entities undoubtedly have wide-area or even nationwide requirements for internal wireless communications, these requirements can and will be met by commercial operations on the 220 MHz spectrum. Further, because commercial operators will wish to offer service to as many customers as possible, 220 MHz services will become more widely available if the Commission does not restrict eligibility on these channels.

Unlike noncommercial operations where the licensee uses the spectrum for internal requirements, commercial operations dictate varied and efficient use of spectrum. In addition, since noncommercial use would allow the offering of excess capacity by the noncommercial license to other entities, if not initially, in the near the future, noncommercial licensees would enter the CMRS marketplace through the provision of services on an excess capacity basis. The difference between these noncommercial licensee and narrowband and broadband PCS licensees will be the fact that the noncommercial licensees did not have to pay the billions of dollars that the PCS industry paid for their spectrum. Therefore, it is imperative to the CMRS marketplace and to the efficient use of 220 MHz spectrum and the rapid implementation of 220 MHz service that the Commission not set-aside any 220 MHz spectrum for noncommercial use and not limit the pool of eligible licensees for the 220 MHz spectrum.<sup>4</sup>

### **3. Channel Block Sizes**

In the *Third NPRM*, the Commission proposed to license the available nationwide spectrum in 3 ten-channel blocks. In addition, the Commission proposed to license the EAs in 5 and ten-channel blocks and the regional licenses in ten, fifteen and twenty channel blocks. PageNet supports the Commission's proposals regarding the channel block sizes of the Phase II licenses. As proposed, the channel block allocations should allow

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<sup>4</sup> PageNet is not suggesting that the Commission reallocate the current Public Safety and Emergency Medical Radio 220 MHz spectrum set-asides.

220 MHz band licensees to compete in the CMRS marketplace by offering a variety of PCS-type, one-way, two-way, data and other services. In addition, the proposed channel block allocations also provide for the possibility of numerous licensees in any given area, which will promote competition and a greater variety of services.

**4. Limit On Number Of Licenses Acquired by a Single Licensee**

In the *Third NPRM*, the Commission requested comment on whether it should limit the number of Phase II nationwide authorizations that may be obtained by a single licensee. PageNet believes that the Commission should not limit the number of 220 MHz licenses held by any one licensee in any area and that such limitation could reduce auction revenues.

In the PCS marketplace, licensees will distinguish themselves by many factors. Probably the most critical factor in attracting customers will be the ability to offer a unique service or a unique set of services. Therefore, by limiting the number of licenses that can be held by any 220 MHz licensee, the Commission would be manipulating the future CMRS marketplace without even knowing the types of services that would ultimately be provided on the 220 MHz spectrum. Therefore, since competitive bidding itself defeats speculation and warehousing and because spectrum is too costly to license without using, license limitations or spectrum caps are unnecessary. Accordingly, in order for the public to receive full value for the 220 MHz spectrum and to encourage new services and swift roll-out, the Commission should allow

competitive bidding to place the 220 MHz spectrum in the hands of the licensees that most value the spectrum.

**C. The New Regulatory Framework For The 220 MHz Band Must Allow 220 MHz Licensees The Flexibility To Compete In The CMRS Marketplace**

The competition in the CMRS marketplace will be stiff. That competition will include cellular carriers that are able to provide voice service as well as PCS-type and fixed services, 800 and 900 MHz SMR carriers that are able to provide voice, paging and mobile data service, PCP and public land mobile paging carriers providing a variety of traditional and advanced paging services and broadband and narrowband PCS carriers with block channel allocations that will be able to provide voice, data, advanced two-way messaging and any other mobile service that is developed. For the 220 MHz licensees to enter, survive and flourish in the CMRS marketplace, in this rulemaking, the Commission must provide the 220 MHz service with the regulatory framework to compete with in the CMRS marketplace.

**1. 220 MHz Licensee Must Be Able To Aggregate Their Channels**

In the *Third NPRM*, the Commission proposed to allow licensees of contiguous 220 MHz spectrum to aggregate their channels for wider bandwidth service offering. PageNet supports this proposal. As noted above, narrowband and broadband PCS licensees were authorized spectrum in channel blocks, which allows the licensee to implement a variety of services that require different channelization. Like PCS, 220 MHz licensees should be able to aggregate spectrum in order to offer services that require a

greater than 5 kHz bandwidth.<sup>5</sup> This will allow 220 MHz licensees to offer advanced one-way or two-way telecommunications services as dictated by the marketplace, rather than limit 220 MHz licensees to services that are dictated by the current 5 kHz channelization. Therefore, it is imperative that the Commission allow 220 MHz licensees that acquire licenses with contiguous spectrum to aggregate both its lower and upper spectrum to accommodate its data, one-way, two-way, or PCS-type service offerings. If the Commission does not allow aggregation, 220 MHz licensees will enter the CMRS marketplace without the ability to effectively compete.

## **2. The Market Should Decide What Services 220 MHz Licensees Provide**

In the *Third NPRM*, the Commission proposed removing the current restriction against paging operations in the 220 MHz band. PageNet supports this proposal. Specifically, PageNet believes that when the Commission awards CMRS licenses pursuant to competitive bidding, the licensees should be given the greatest latitude possible for the introduction of new and advanced services as well as traditional services, such as paging.

In the *Third NPRM*, the Commission also noted that the 220 MHz band is well suited to the provision of two-way land service. However, the 220 MHz band is also well suited to one-way services and it should be emphasized that two-way technology is not the only technology that is undergoing a revolution. Further, since

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<sup>5</sup> Aggregated use would not be subject to guardband restrictions.



there will always be a need for one-way services in the CMRS marketplace, 220 MHz licensees should be able to provide paging or any other one-way or two-way mobile service that it chooses. If there is a valid need for the service, the marketplace will dictate the extent to which the service is offered. As such, 220 MHz licensees should have the option of providing the service or services that customers demand and should not be unduly restricted with respect to such service offering. Since it may be paging or other like services that allows a 220 MHz licensee to initially survive in the CMRS marketplace, the Commission should not foreclose the ability to offer such a service and thereby artificially limit the 220 MHz licensees ability to compete in that marketplace.

**3. The Licensee Will Determine The Most Spectrally Efficient Use Of The 220 MHz Spectrum**

In the *Third NPRM*, the Commission sought comment on the issue of spectral efficiency and asked whether a licensee aggregating spectrum must maintain the spectral efficiency of the 5 kHz narrowband channelization or whether competitive bidding provides sufficient incentives for licensees to use their spectrum efficiently. PageNet believes that there is no question that the Commission should allow the competitive bidding process to be the incentive for spectrum efficiency. First, if the Commission were to require the licensees that aggregate spectrum to demonstrate that their services are at least spectrally efficient as narrowband channelization, the Commission will be foreclosing the number of service offerings that could be provided on the 220 MHz

band spectrum. This will unduly reduce the ability of the 220 MHz license to compete in the CMRS marketplace and limit service choices to customers.

Second, narrowband channelization had significantly delayed the implementation of services in the 220 MHz band because of the lack of equipment. If the Commission requires the same type of spectrum efficiency as narrowband technology, it is possible that the 220 MHz will again suffer significant delays in implementation of services due to lack of equipment. In addition, there must be flexibility to implement future technologies with alternative spectrum efficiency characteristics.

Third, the competitive bidding process will ensure that licensees use their spectrum efficiently. The licensees will have incurred significant expense in the licensing of the spectrum and they will have every incentive to construct and operate the most sufficient system possible. However, if the Commission were to artificially limit the ability of the 220 MHz license to offer services, the Commission will place 220 MHz licensees at a disadvantage in the marketplace because the other CMRS licensee are not subject to narrowband channelization spectrum efficiency requirements.

Finally, in order to compete in the CMRS marketplace, 220 MHz licensees must have less regulation, not more. As services are implemented or services developed in the future, today's narrowband spectrum efficiency will quickly become unenforceable and an archaic bar to the roll-out of new services. Further, 220

MHz licensees, unlike other CMRS licensees, will be unable to rapidly response to consumer demand for new services.

Accordingly, for the reasons stated, spectrum efficiency will be a by product of market forces, the necessity to recoup the investment in the spectrum, and advances in technology. As such, it is not necessary for the Commission to graft a layer of regulation onto the 220 MHz licensees that will reduce the ability of the 220 MHz licenses to compete in the CMRS marketplace.

### **III. The Commission Should Return The 33 Pending Noncommercial Nationwide Applications**

Revision of the rules applicable to the 220 MHz service compels the return of the presently pending noncommercial nationwide applications which will, by virtue of the proposed rules, become inconsistent with the new regulatory framework of 220 MHz. Specifically, the 220 MHz services, particularly noncommercial services, will be operating under dramatically different regulations. Therefore, the Commission should dismiss and return the applications, together with the applicable application fees, without prejudice. The noncommercial nationwide applicants who desire to reapply and participate in the spectrum auction would be free to do so.

With respect to the issue of the return of the pending noncommercial nationwide applications, there is ample precedent and clear legal authority for dismissing pending applications that are inconsistent with new Commission rules. In *Private Operational-Fixed Microwave Service*, 48 FR 32,578 (1983), *aff'd*, *Affiliated Communications Corp. v. FCC*, No. 83-1686 (D.C. Cir. May

8, 1985), the Commission citing the administrative burdens involved in resolving the changes needed as a result of rule changes, dismissed 1,400 applications and opened a new filing window for applicants to apply under the new rules. As such, the Commission has previously dismissed pending applications, without prejudice to the applicant's right to re-file, as a result of a change in rules. In *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987), the D.C. Circuit upheld a Commission determination to apply new rules to pending applicants. The new 220 MHz service rules, if ultimately adopted, will represent a very significant change in 220 MHz service licensing. Under these changed circumstances, applying the new rules to the pending applications would conform with the Commission precedent.

In 1993, when the Commission adopted the prohibition on settlements among MDS applicants, the Commission specifically addressed the issue of applying the new rule to pending applications and its authority to do so. The Commission concluded that "it is well-settled that the rules applicable to previously-filed applications may be amended."<sup>6</sup> The Commission has applied new rules to pending applications in other cases.<sup>7</sup> In this

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<sup>6</sup> *Report and Order*, 8 FCC Rcd at 1447 (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)). See also *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

<sup>7</sup> See *Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 FCC 2d 175 (1984), recon., 101 FCC 2d 577 (1985); *Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services*

Continued on following page

instance, application of the new rules would necessarily result in the dismissal of pending applications.

Equity considerations also support returning pending applications. First, the act of filing an application did not *per se* vest any right in the applicant. Second, the "service" for which the applicants applied will no longer exist once the FCC implements the new regulatory framework for the 220 MHz service. Furthermore, had they been eligible to apply for 220 MHz noncommercial authorizations at the time, and been able to operate under this new regulatory framework, PageNet, like many other licensees may have sought to become licensed for this spectrum. For example, it is very likely that many providers of commercial mobile radio services did not apply for nationwide noncommercial licenses because the applicable rules restricted permissible operations.<sup>8</sup> Accordingly, because there will be no eligibility limitations, the Commission should provide this opportunity for all interested entities to license this spectrum.

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*for Low-Earth Orbit Satellites*, 7 FCC Rcd 1628 n.22 (1992) ("the Commission by rule making may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest"); *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services*, 7 FCC Rcd 4484, 4489 n.66 (1992).

<sup>8</sup> For example, present Section 90.733 precludes the licensee from offering fixed-only and paging-only operations in the band. Similarly, Section 90.739 does not allow a licensee to hold more than one system in the band.


#### IV. Conclusion

The 220 MHz band should be and will be a valued element of the CMRS marketplace and an important part of the information superhighway. The task of the Commission in this proceeding is to develop a regulatory framework that will allow 220 MHz licensees to most effectively compete in the CMRS marketplace. To provide the 220 MHz with the ability to compete in the CMRS marketplace, the Commission should adopt measures that provide for flexibility in the build-out and operation of 220 MHz systems. Those measures were proposed in the *Third NPRM* and include different license service areas, channel aggregation, and the ability to offer one-way, two-way, data or any other type of service. In addition, the Commission must also ensure that the American people reap the value of the use of public spectrum through the use of competition bidding for all future 220 MHz service licenses.

Respectfully submitted,

**PAGING NETWORK, INC.**

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